Supreme Court, U.S.
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No. 97-853

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROGER COWAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether intent to defraud is an element of the offense of forging the signature of a federal judge under 18 U.S.C. 505.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 116 F.3d 1360. The order of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 12-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1997. A petition for rehearing was denied on August 22, 1997. Pet. App. 11. The petition for a writ of certiorari was filed on November 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the District of Wyoming, petitioner was convicted of forging a federal judge's signature, in violation of 18 U.S.C. 505. He was sentenced to five months' imprisonment, to be followed by a two-year term of supervised release. The court of appeals affirmed. Pet. App. 1-10.

1. The parties stipulated to the pertinent facts. Petitioner is an attorney licensed to practice in Wyoming. In the winter of 1991-1992, Carl Hostetter retained petitioner under a contingent fee arrangement to pursue a personal injury claim against General Motors Corporation arising from an automobile accident in which Hostetter was injured. During 1992 and 1993, Hostetter repeatedly contacted petitioner to determine the status of his case. Petitioner informed Hostetter that he had filed suit when in fact he had not. On further inquiries from Hostetter, petitioner stated that he had submitted the case for mediation when in fact he had not. Pet. App. 3.

Petitioner prepared a document under the heading of the United States District Court for the District of Wyoming entitled "Mediation Decision—Hostetter v. G.M., et al." The document purported to award Hostetter $696,000 in damages. At the end of the document, petitioner, without authorization, placed a signature purporting to be that of United States District Judge Alan B. Johnson. At the time petitioner prepared the document, he had still not filed suit on Hostetter's behalf. Nevertheless, petitioner informed Hostetter of the favorable mediation "decision," and provided Hostetter with a copy of the document. Pet. App. 3.

Eventually, when his award failed to materialize, Hostetter contacted the district court to check on the status of his lawsuit. The court advised Hostetter that no such lawsuit existed. Thereafter, Hostetter confronted petitioner with that information. Petitioner continued to insist that the bogus "mediation decision" was genuine, but stated that, notwithstanding the successful mediation, settlement efforts had been unsuccessful and that he would now have to sue General Motors. On the basis of that explanation, Hostetter agreed to allow petitioner to continue as his attorney. Petitioner then filed a lawsuit against General Motors on Hostetter's behalf, but the court granted summary judgment against Hostetter and dismissed the case. Pet. App. 4; Gov't C.A. Br. 6-7. Hostetter subsequently retained another lawyer to reopen the case against General Motors and sued petitioner and his law firm for malpractice. Pet. App. 15.

2. Petitioner filed a pretrial motion to dismiss the indictment on the ground that the stipulated facts were insufficient to establish the element of an intent to defraud. The district court denied the motion, holding that intent to defraud is not an element of a Section 505 offense. Pet. App. 15-19. The court alternatively held that the stipulated facts were sufficient to establish fraudulent intent. *Id.* at 19-21. Thereafter, petitioner entered a conditional plea of guilty, reserving his right to appeal the court's denial of his motion to dismiss the indictment.

3. The court of appeals affirmed. Pet. App. 1-10. The court held that an intent to defraud is not an element of the crime of forging the signature of a federal judge under Section 505. The court began by stating that "nowhere does [Section] 505 say the

crime of forging a federal judge's signature requires an intent to defraud." *Id.* at 4. To the contrary, the court explained that the "plain language only requires that a defendant charged under the statute knowingly forge the signature of a federal judge 'for the purpose of authenticating any proceeding or document.'" *Id.* at 5 (quoting 18 U.S.C. 505).

The court of appeals acknowledged that the common law crime of forgery required an intent to defraud and that, ordinarily, a statutory term is construed in light of its common law meaning. Pet. App. 5. The court observed, however, that "'Congress' general purpose in enacting a law may prevail over this rule of statutory construction' where the common law is inconsistent with that purpose." *Id.* at 6-7 (quoting *Moskal* v. *United States*, 498 U.S. 103, 117 (1990)). The court further explained that "[t]he purpose of [Section] 505 is to protect the reputation and integrity of the federal courts, their official documents and proceedings, rather than simply to outlaw a narrow category of fraud." *Id.* at 7. Thus, the court continued, Section 505 "applies whenever someone attempts to impugn this integrity by forging a federal judge's signature onto a document in order to make that document appear authentic." *Ibid.*

The court of appeals also noted that, while several other federal forgery statutes do not expressly require proof of an intent to defraud, Pet. App. 7-8 (citing 18 U.S.C. 485, 490, 493, 496, 497, 498, 499, 501, 502, 506), Congress explicitly has required proof of fraudulent intent in a range of federal forgery statutes. *Id.* at 8-9 (citing 18 U.S.C. 471, 478, 482, 500). The court was therefore "satisfied that if Congress had intended to make the intent to defraud an element of the crime of forging a federal judge's

signature under [Section 505], it would have done so expressly." *Id.* at 9.

ARGUMENT

Petitioner renews his contention (Pet. 6-15) that an intent to defraud is an element of a Section 505 offense, and that the stipulated facts failed to establish that he entertained such an intent when he forged a federal judge's signature. Those contentions lack merit.

1. Section 505 makes it a felony to "forge[] the signature of any judge * * * of any court of the United States * * * for the purpose of authenticating any proceeding or document, * * * knowing such signature * * * to be false." There is no express textual requirement in the statute making intent to defraud an element of the crime. Rather, the sole intent required by the statute is that the forgery be committed "for the purpose of authenticating any proceeding or document."

Petitioner argues (Pet. 7) that the word "forge" in Section 505 should be read to require proof of an intent to defraud, because the common law crime of forgery required such proof. Statutory terms do not carry their common law meaning, however, if a contrary legislative intent can be gleaned from the statute. See *United States* v. *Wells*, 117 S. Ct. 921, 927 (1997); *Moskal* v. *United States*, 498 U.S. 103, 117 (1990); *Taylor* v. *United States*, 495 U.S. 575, 593-596 (1990).

As the court of appeals noted (Pet. App. 5), Section 505 already contains an express *mens rea* requirement, *i.e.*, that a defendant falsely portray the signature of a federal judge "for the purpose of authenticating any proceeding or document." There is accord-

ingly no need to read into the statute an additional common law element of criminal intent. Cf. *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). Moreover, the purpose of Section 505 is not to "outlaw a narrow category of fraud," but "to protect the reputation and integrity of the federal courts, their official documents and proceedings." Pet. App. 7. Forgery of a federal judge's signature for the purpose of authenticating a document inherently threatens the integrity of the courts, whether or not the action is accompanied by a fraudulent intent. Thus, the court of appeals correctly concluded that its reading of the statute "is true to both its text and purpose." *Ibid.*

The larger statutory context in which Section 505 appears provides additional support for the conclusion that Congress did not intend to make an intent to defraud an element of the offense. At the same time that Congress enacted Section 505 as part of its 1948 recodification of the federal criminal code, Act of June 25, 1948, ch. 645, §1, 62 Stat. 714, it explicitly required proof of an "intent to defraud" in four other provisions involving forgery. See *id.* at 705, 18 U.S.C. 471 (prohibiting forgery of federal obligations "with intent to defraud"); *id.* at 707, 18 U.S.C. 478 (prohibiting forgery of foreign obligations "with intent to defraud"); *id.* at 708, 18 U.S.C. 482 (prohibiting forgery of foreign bank notes "with intent to defraud"); *id.* at 712, 18 U.S.C. 500 (prohibiting forgery of postal service money orders "with intent to defraud"). The absence of any similar "intent to defraud" language in Section 505 indicates that Congress did not mean to require any additional element of intent when it prohibited a person from "forg[ing]" a federal judge's signature

"for the purpose of authenticating any proceeding or document."[1]

In *United States* v. *Wells*, *supra*, this Court held that materiality is not an element of the crime of knowingly making a false statement to a federally insured bank under 18 U.S.C. 1014. Examining the text of Section 1014, which did not "so much as mention[] materiality," the Court concluded that, "under the first criterion in the statutory interpretation hierarchy," materiality is not an element of the offense. 117 S. Ct. at 923. Observing that the history of Section 1014 "confirms the natural reading" of the statute, the Court explained that Congress had included materiality as an element in a number of false representation provisions at the same time Congress enacted Section 1014 in 1948. *Id.* at 928.

Similarly, earlier this Term, this Court held in *Bates* v. *United States*, 118 S. Ct. 285, 291 (1997), that 20 U.S.C. 1097(a), which prohibits the "knowing[] and willful[] * * * misappl[ication]" of federally provided student loan funds, does not require proof that the defendant "aimed to injure or defraud anyone." The Court reasoned that "[t]he text of [Section] 1097(a) does not include an 'intent to defraud' state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face." 118 S. Ct. at 290. The Court also explained that Section 1097(d), enacted at the same time as Sec-

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[1] Moreover, if Congress generally intended the word "forge" to require proof of an intent to defraud, then language expressly requiring an "intent to defraud" (see, *e.g.*, 18 U.S.C. 471, 478, 482, 500) would be redundant. It is a cardinal rule of statutory construction that courts should avoid construing statutes in such a way as to render some words or clauses redundant. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

tion 1097(a), expressly contains an "intent to defraud" element. *Ibid.* Thus, the Court concluded that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Ibid.*

This Court's decisions in *Wells* and *Bates* fully support the court of appeals' conclusion that Section 505 does not require proof of an intent to defraud. The express words of Section 505 do not require an additional element of intent. Moreover, the fact that Congress expressly has required proof of an intent to defraud in other forgery statutes is a strong indication that Congress acted deliberately in not requiring an "intent to defraud" element in Section 505.

Petitioner suggests (Pet. 8-11) that Congress intended Section 505 to reach only debtors perpetrating a fraud on the court for financial gain, because Section 505 initially was enacted in 1867 as part of the federal bankruptcy code.[2] As the court of appeals correctly explained (Pet. App. 9), however, "[n]o elucidating legislative history" supports either that interpretation or any other construction that "stray[s] from the plain language of the statute which notably does not limit the statute's effect to bankruptcy actions or require the intent to defraud."

2. Petitioner also argues (Pet. 6-7) that this Court's review is warranted to resolve a conflict among the courts of appeals on whether Section 505 requires proof of an intent to defraud. The Sixth Circuit has concluded that Section 505 should be read

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[2] See Bankruptcy Act of Mar. 2, 1867, ch. 176, § 46, 14 Stat. 539 (1867).

to require proof of an intent to defraud because the crime of forgery at common law required such proof. See *United States* v. *Bertrand*, 596 F.2d 150, 151-152 (6th Cir. 1979); *Levinson* v. *United States*, 47 F.2d 470, 471 (6th Cir. 1931). In *United States* v. *London*, 714 F.2d 1558, 1563-1564 (1983), the Eleventh Circuit stated in dictum that an intent to defraud is an element of Section 505.[3] Those decisions, however, were decided long before this Court's decisions in *Wells* and *Bates*. Until the Sixth and Eleventh Circuits have had an opportunity to reconsider their position in light of *Wells* and *Bates*, review of the issue by this Court would be premature.

Even assuming that the question whether Section 505 requires proof of an intent to defraud is an issue of recurring importance that would warrant this Court's review, this case would not be an appropriate vehicle to decide the issue. Contrary to petitioner's assertion (Pet. 12-15), the stipulated facts in this case provide an adequate factual basis for the conclusion that petitioner forged a federal judge's signature with fraudulent intent. Hostetter retained petitioner, a lawyer, to pursue Hostetter's cause of action against General Motors arising out of an automobile accident in which Hostetter was injured. Pet. App. 13. As the district court below correctly observed (*id.* at 3, 21), petitioner "not only failed to file a lawsuit, he also repeatedly lied to Hostetter about the status of his case and constantly created new and inventive stories to cover his lies." By presenting his client with a forged document in furtherance of petitioner's

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[3] In *United States* v. *Dyer*, 546 F.2d 1313, 1316 n.4 (1976), the Seventh Circuit declined to reach the issue, but suggested that Section 505 requires proof of an intent to defraud.

scheme to mislead his client, petitioner seriously interfered with his client's financial interest in pursuing a lawsuit. Cf. Pet. App. 15 (noting that Hostetter retained another lawyer to reopen his case after it was dismissed and filed suit against petitioner and his law firm).

Simultaneously, petitioner's submission of the forged document furthered his own financial interest in retaining Hostetter's business. Petitioner's intent to take financial advantage of a confidential relationship with his client is sufficient to demonstrate fraudulent intent. See, *e.g.*, *United States* v. *O'Hagan*, 117 S. Ct. 2199, 2208 (1997) (a fiduciary "who pretends loyalty to the principal * * * for personal gain * * * defrauds the principal") (internal quotation marks and brackets omitted); *United States* v. *Angelos*, 763 F.2d 859, 861 (7th Cir. 1985) (intent to defraud under bank misapplication statute, 18 U.S.C. 656, shown by defendant's breach of fiduciary obligation to bank, even though that defendant "thought correctly[] that the bank would not be hurt"). Accordingly, even assuming that Section 505 requires proof of an intent to defraud, there is an adequate basis in the record to support petitioner's conviction on his plea of guilty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

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